

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 304 of the)	CS Docket No. 97-80
Telecommunications Act of 1996)	
)	
Commercial Availability of Navigation Devices)	
)	
Compatibility Between Cable Systems and)	PP Docket No. 00-67
Consumer Electronics Equipment)	

COMMENTS OF HOME BOX OFFICE, INC.

Home Box Office, Inc. (“HBO”), by its attorneys, hereby supports the Petition for Reconsideration of the Motion Picture Association of America (“MPAA”), submitted December 29, 2003 in response to the Commission’s Second Report and Order in the above-captioned proceeding.^{1/} In particular, HBO supports MPAA’s position that Subscription Video On Demand (“SVOD”) should be classified as a defined business model and designated as “Copy Never.”

Despite the fact that the parties to the Plug and Play Memorandum of Understanding (“MOU”) representing the consumer electronics and cable television industries concluded that SVOD was a defined business model that should have a “Copy Never” ceiling, the Commission classified SVOD as an undefined business model in the Second Report and Order. The premise for the Commission’s decision was that SVOD is still evolving and that this evolution should not

^{1/} *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 97-80, PP Docket NO. 00-67, FCC 03-225 (rel. Oct. 9, 2003) (“Second Report and Order”).

be hindered by categorizing the service as a defined business model at this time.^{2/} As a result, the Commission established rules that (i) require distributors of SVOD services to give public notice of the encoding rules they intend to implement for the services, and (ii) subject the distributors to complaints that could undermine the encoding rules selected by the distributors and the underlying content providers.

HBO submits that SVOD, which is a service already offered widely by Multichannel Video Programming Distributors (“MVPDs”), is not an undefined business model. In fact, SVOD is an established, highly successful product that already is available in cable television systems serving in excess of two-thirds of all cable subscribers nationwide. Classifying SVOD as an undefined business model, as MPAA asserts, will only “inject greater uncertainty into content licensing negotiations, generate superfluous announcements in PR Newswire, and produce unnecessary challenges by competitors.”^{3/} In fact, the ultimate consequence of categorizing SVOD as an undefined business model will be to stifle the development of the service, the very result the Commission seemed intent on avoiding.^{4/}

Moreover, classifying SVOD as an undefined business model, with fluid encoding rules that are subject to change based on a complaint procedure, could have the effect of altering viewer expectations to the detriment of SVOD consumers. For example, the HBO SVOD service currently provides viewers with many hours of high value content, which HBO is willing to offer under a “Copy Never” encoding structure. If, as a result of a complaint procedure, HBO was forced to make its SVOD service “Copy Once,” many program choices that have proven very popular with HBO SVOD viewers would be withdrawn. Accordingly, HBO agrees with

^{2/} Second Report and Order at ¶ 74.

^{3/} MPAA Petition for Reconsideration at p. 5.

^{4/} *Id.* at p. 5.

and supports MPAA's position. SVOD should be a defined business model with the "Copy Never" encoding ceiling available to it.

A. SVOD Is Not an Undefined Business Model

HBO has been a leader in the development of premium video programming services offered in both a subscription "linear" format and through SVOD. HBO was the first to offer a premium SVOD service, launching HBO On Demand on July 1, 2001. HBO On Demand currently is available in 82 television markets, 32 of which are in the top-50 DMAs. The MVPD systems in these markets serve more than two-thirds of all cable subscribers in the United States.

HBO is not alone in offering SVOD. Program networks such as Showtime, The Movie Channel, Starz!, Disney Channel and Independent Film Channel all offer SVOD options.^{5/} Thus, SVOD is not a "new" or "undefined" business model but a model that has been around for almost three years. It has been successfully implemented in MVPD systems throughout the country and it has established consumer expectations as to content, convenience and features. Accordingly, HBO concurs with MPAA that the Plug and Play MOU parties correctly found that SVOD was a defined business model.

B. SVOD Should be Classified as a Defined Business Model with "Copy Never" Status

Classifying SVOD as a defined business model pursuant to the Plug and Play MOU, and affording it a "Copy Never" encoding classification, will enable SVOD to develop further with no adverse consequences to consumers. Such a result will (i) create and maintain more SVOD program choices for consumers, (ii) preserve consumer options to select the content and timing of their television viewing, and (iii) provide maximum flexibility for SVOD providers to fashion competitive business models that offer consumers choice and variety.

^{5/} North American VOD Deployments, <http://www.cedmagazine.com/ced/2003/0603/VODdeploy03.pdf>.

1. *“Copy Never” Results in More Choice for Consumers*

It is a simple fact in the marketplace that distributors of high value video content will not permit copying of their programming if there is a significant danger that such copying could undermine other markets for the content, such as home video sales. In fact, home video sales provide critical revenue to finance the production of highly successful and critically acclaimed programming.

The HBO On Demand service illustrates this principle. Numerous episodes of HBO’s highly successful original programming (such as “The Sopranos” and “Six Feet Under”) are available each month on SVOD to viewers who are offered the flexibility to watch, but not to digitally archive, new and old episodes on their own schedules. Consumers interested in digitally archiving these programs can do so in various other ways (*e.g.*, record current episodes from linear networks or purchase collections of episodes on DVDs). If HBO’s SVOD service was limited to a “Copy Once” designation, HBO likely would need to restrict the number of episodes of its original programming it provides to viewers on SVOD to protect other distribution systems such as DVD sales. Thus, with “Copy Never,” original content providers such as HBO are more inclined to offer highly-valued original programming on SVOD, providing more choice for consumers. And, as noted below, a “Copy Never” ceiling for SVOD does not prevent a distributor from providing a service to its SVOD customers with more liberal copying capabilities, if that distributor believes that such capabilities will enhance the value and attractiveness of its SVOD service.

2. *“Copy Never” in an SVOD Model will Not Harm Consumers*

The ability to copy programming for personal use is founded on the premise that consumers should have the convenience of time shifting programming provided on a linear basis to provide more viewing flexibility. Such flexibility is inherent already in the SVOD model where the consumer has the ability to view a program at any time and to control playback, including start, fast forward, rewind, pause, stop and restart. Thus, content and timing choices

and control are already available in SVOD, without the need for consumer copying, and allowing “Copy Never” as a designation for SVOD will not deprive consumers of these benefits in the least. If for some reason, however, consumers were to conclude that copying capabilities are important to their enjoyment of SVOD, they would demonstrate their preferences by not subscribing to “Copy Never” SVOD services, and in an open marketplace, programmers would respond to address any perceived consumer dissatisfaction.

3. *“Copy Never” Preserves Maximum Flexibility for Programmers and Distributors*

“Copy Never” gives distributors and programmers maximum flexibility to determine the appropriate copying rules for a particular service. The “Copy Never” designation is not mandatory for SVOD programming but can be determined by various distributors, based on their business strategy, the content they provide and the rights they negotiate with their respective licensors. Those content owners and SVOD distributors who believe their business models would not be competitive without more liberal copying rules would be free to negotiate for a “Copy Once” designation for programs in their particular services. On the other hand, distributors who wish to provide more highly valued content over their SVOD offerings would be able to enter into the more restrictive “Copy Never” arrangement likely to be required by the owners of such content. Thus classifying SVOD as “Copy Never” will not stifle the development of SVOD or lead to the demise of a viable service. Instead, a “Copy Never” alternative will preserve negotiating flexibility for content owners and distributors and, more importantly, maximize choice for consumers. Limiting SVOD to “Copy Once” encoding rules, on the other hand, will limit consumer choice and diversity in SVOD program offerings and stifle development of SVOD services.

CONCLUSION

For the foregoing reasons, HBO supports the MPAA petition for reconsideration. HBO submits that the Commission should reconsider the business model classification adopted for

SVOD in its Second Report and Order, and classify SVOD as a defined business model with a “Copy Never” encoding designation.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Stefani Watterson, do hereby certify that on this 10th day of March, the foregoing
Comments of Home Box Office, Inc. was served on the following by first class mail:

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